

IDAHO WATERSHEDS PROJECT

IBLA 98-382

Decided January 11, 1999

Appeals from two Decision Records/Findings of No Significant Impact of the Area Manager, Challis Resource Area, Idaho, Bureau of Land Management, approving construction of temporary fences within grazing allotments and partially within a wilderness study area. EA #ID-040-7005; EA #ID-040-7006.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness–Grazing and Grazing Lands

BLM's approval of construction of temporary fences within grazing allotments partially within a wilderness study area violates neither the nonimpairment mandate of section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1994), nor applicable BLM policy, where BLM properly determines that the fences will protect and enhance the wilderness values of that area.

2. Environmental Quality: Environmental Statements–Federal Land Policy and Management Act of 1976: Wilderness–Grazing and Grazing Lands–National Environmental Policy Act of 1969: Environmental Statements

BLM's approval of construction of temporary fences within grazing allotments and partially within a wilderness study area is not in violation of section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §4332(2)(C) (1994), where BLM adequately considers the environmental impacts of such activity and all appropriate alternatives.

APPEARANCES: Jon Marvel, President, Idaho Watersheds Project, Hailey, Idaho, for Appellant; Kenneth M. Sebby, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Idaho Watersheds Project (IWP or Appellant) has appealed from two Decision Records (DR)/Findings of No Significant Impact (FONSI) of the Area Manager, Challis Resource Area, Idaho, Bureau of Land Management (BLM), dated June 1, 1998. The DR for Environmental Assessment (EA) #ID-040-7005 pertains to the Burnt Creek enclosure and BLM's decision to effectively fence cattle out of the riparian area of Burnt Creek, 4 miles of which are outside the Burnt Creek Wilderness Study Area (WSA) and 2 miles of which are within the WSA. The DR for EA #ID-040-7006 pertains to Upper Pahsimeroi Riparian Fences and BLM's decision to fence cattle out of the specified riparian areas of Mohogany Creek and the Pahsimeroi River, encompassing approximately 7-3/4 miles of fence, 1/2 mile of which falls within the Burnt Creek WSA.

The Challis Resource Area Manager provided the following rationale for her decision regarding the Burnt Creek enclosure located within the Burnt Creek Allotment and Upper Pahsimeroi Allotment:

Rationale: Protective listing of Snake River spring/summer/fall chinook salmon and a pending listing of the bull trout under the Endangered Species Act has necessitated a thorough review of impacts of authorized activities within critical habitat areas. The proposed fence will allow for the protection of riparian vegetation within this critical habitat area, thereby reducing sediment entering the riverain system as a result of livestock grazing impacts to riparian habitat along Burnt Creek. The proposed action is in conformance with the Ellis Pahsimeroi Management Framework Plan (1982).

(DR for EA #ID-040-7005 at 1.) The rationale for the proposed Upper Pahsimeroi riparian fences was identical except that it referred to grazing impacts to riparian habitat along the Pahsimeroi River instead of along Burnt Creek. See DR for EA #ID-040-7006 at 1.

The DR/FONSI for the Burnt Creek enclosure, based on EA #ID-040-7005, considered the environmental consequences of constructing the fence within the Burnt Creek Allotment and alternatives thereto. In the FONSI, the Area Manager concluded that, given certain mitigating measures, no significant environmental impacts would result from construction of the fence; thus, BLM was not required to prepare an environmental impact statement (EIS), pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994). A similar finding was made for the Upper Pahsimeroi riparian fences. See DR for EA #ID-040-7006 at 1.

In its Statement of Reasons (SOR) for appeal, IWP asserts that in rendering the two decisions approving fence construction on the grazing allotments, BLM failed to conduct a required suitability analysis of grazing on the affected allotments. (SOR at 1.) Appellant claims the Federal

Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (1994), includes a "multiple use/sustained yield" mandate which the Board has interpreted in National Wildlife Federation v. BLM, 140 IBLA 85 (1997), to require an evaluation of "the suitability of grazing by balancing competing resource values to ensure the public lands are managed in a manner that will best meet the current and future needs of the American people." (SOR at 2.) Appellant claims that BLM filed to undertake this suitability analysis in the present case. Id.

Appellant claims that BLM's decisions have resulted in "violation of BLM's non-impairment mandate of Section 603(c) of FLPMA." (SOR at 3.) Specifically, IWP claims, in pertinent part:

The installation of a half mile of fence within the Burnt Creek WSA as proposed in EA #ID-040-7006 and additional fencing in the same WSA as proposed in EA # ID-040-7005 violates BLM's policy on the management of WSAs as set forth in the Interim Management [P]olicy and Guidelines for Lands Under Wilderness Review (IMP). The BLM is required to manage the lands "in a manner so as not to impair their suitability for preservation as wilderness." 43 USC Section 1782(c) (1994). The BLM's management of this WSA must meet certain non-impairment criteria. The area manager in this case has made an inadequate determination that the construction of the fencing as proposed complies with the IMP. The EAs are deficient in that there is no provision for a maintenance schedule, a procedure for the fencing, or of the wilderness characteristics of the area within the WSA impacted by the fencing, whether these areas have key vistas or visitor use areas, and finally there is no written assessment of cumulative impacts of the proposed action. The BLM's general rule for non-impairment states "the general rule is that the only activities permissible in WSAs are temporary uses that create no new surface disturbance nor involve the permanent placement of structures." In this case, the BLM's analysis supporting the Proposed Decisions is inadequate to confirm that non-impairment will be the result of these decisions.

(SOR at 3.)

IWP further claims that the two EAs performed by BLM are deficient under NEPA in numerous respects. (SOR at 2.) Appellant contends that BLM failed to address the high cost of the fencing or the benefit to be achieved in light of that cost. IWP claims that 40 C.F.R. § 1502.23 requires incorporation of a cost/benefit analysis in an environmental assessment where relevant to a choice among environmentally different alternatives. (SOR at 2.) Appellant claims that by failing to address the cost of the fencing in the EA, "these decisions must be set aside." Id.

IWP also claims NEPA violations for failure to consider aesthetic impacts associated with the fence construction, failure to address water quality, and failure to consider an adequate array of alternatives to

the fencebuilding. (SOR at 2.) With respect to visual impacts, Appellant states that although NEPA requires consideration of aesthetic impacts, the EAs and DRs "fail to address appropriately the visual impacts of the many miles of new fencing proposed for these allotments." *Id.* With regard to water quality, IWP claims the decisional process failed to address in sufficient detail the likely impacts of the proposed actions on water quality. *Id.* For example, Appellant claims that water gaps are proposed to be maintained for livestock watering on Burnt Creek without any analysis of the effects of this concentrated livestock use and the likely pollution from such use. (SOR at 2-3.)

Appellant claims NEPA has been violated further by BLM's failure to consider an adequate range of alternatives to the Proposed Actions. IWP claims that the analysis of Alternative #2, the "no action" alternative, is " cursory and inadequate and a reasonable alternative of removing livestock from these allotments has not been addressed in any way." (SOR at 3.)

Although BLM has not filed an Answer in this case, its Response to Request for Stay (Response) addresses IWP's concerns. BLM states:

Appellant alleges that Bureau of Land Management's "clear violations of FLPMA, NEPA and the Interim Policy in regard to WSA's are a strong indication of IWP's likelihood of success on the merits in this Appeal." In support thereof, Appellant first relies upon an extremely expansive interpretation of the Board's holding in National Wildlife Federation v. Bureau of Land Management, 140 IBLA 85 (1997), the "Comb Wash Decision." Comb Wash did not deal with range improvements, rather, it dealt with the issuance of multiple year grazing permits. Appellant cannot now contest the existing grazing permits in this case. The decision to graze or not to graze was made earlier, at which time Appellant could have contested it. The Appellant cannot reach the issues legitimately reached in the Comb Wash decision in the context of the Bureau of Land Management actions with respect to the decisions on appeal.

Appellant further alleges violations of NEPA and [the] Bureau of Land Management's Non-Impairment policy. However, the decisions in issue are site specific project analyses within the confines of the Ellis-Pahsimeroi Management Framework Plan. Moreover, Washington Office Instruction Memorandum no. 95-136, issued June 1, 1995, relieved field offices of the necessity of performing a benefit-cost analysis. Additionally, the Comb Wash decision specifically clarified that FLPMA does not require an economic cost/benefit analysis by the Bureau of Land Management. National Wildlife Federation v. Bureau of Land Management, 140 IBLA 85, 99-100 (1997). Aesthetics, water quality and associated impacts, and adequate alternatives are all considered in the EA's. And, finally, with respect to the non-impairment issue under § 603(c) of FLPMA, lands available for wilderness designation are not required to be managed as though they have already

been designated as wilderness. Rather, any use, facility, or activity must be temporary. Temporary use includes the temporary electric fence covered by the decisions appealed. No surface disturbance nor permanent placement of any component is allowed and the use can easily and immediately be terminated upon wilderness designation. The fences also will minimize impacts to the WSA and actually protect or enhance the land's wilderness values.

(Response at 4-5.)

A portion of the lands at issue here are within the Burnt Creek WSA, which is being reviewed by Congress for possible designation, pursuant to the Wilderness Act, as a wilderness area. They are therefore subject to the protection of section 603(c) of FLPMA until Congress either designates the lands or releases them from further consideration. See Committee for Idaho's High Desert, 139 IBLA 251, 253 (1997). This means that BLM is required to manage the lands "in a manner so as not to impair the[ir] suitability * * * for preservation as wilderness." 43 U.S.C. § 1782(c) (1994); Nevada Outdoor Recreation Association, 136 IBLA 340, 342 (1996). BLM's specific management of the lands is governed by the IMP, which sets forth certain nonimpairment criteria. These criteria are designed to ensure that no activity will occur that will jeopardize or negatively affect Congress' ability to find that the WSA has the necessary wilderness characteristics. Committee for Idaho's High Desert, *supra* at 253.

[1] In deciding whether to approve an action proposed within a WSA, the authorized BLM officer must decide whether it will impair the wilderness suitability of the affected lands. 44 Fed. Reg. 72013, 72023 (Dec. 12, 1979). As a general proposition, however, BLM's approval of construction of temporary fences within grazing allotments partially within a WSA violates neither the nonimpairment mandate of section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1994), nor applicable BLM policy, where BLM properly determines that the fences will protect and enhance the wilderness values of that area. Wilderness Watch Oregon Natural Resources Council, 142 IBLA 302, 307 (1998). The Area Manager made that determination here, concluding that construction of the fences, of a temporary nature within the WSA, complies with the Ellis/Pahsimeroi Management Framework Plan, developed under FLPMA guidelines. See EA #ID-040-7005 at 1; EA #ID-040-7006 at 1.

IWP, however, asserts that the EA failed to consider certain factors required by the IMP. Appellant identifies areas in which it finds the EA deficient in that it alleges there is "no provision for a maintenance schedule, a procedure for the fencing, or of the wilderness characteristics of the area within the WSA impacted by the fencing, whether these areas have key vistas or visitor use areas, and finally there is no written assessment of cumulative impacts of the proposed action." (SOR at 3.)

Section II-B-3 sets forth certain information "needed to reach conclusions on the nonimpairment criteria" that must be contained in an EA.

44 Fed. Reg. at 72022. Included among the information specified are the areas identified by IWP. Id. at 72022-23. We find no error. Each of these areas are covered generally, if not specifically, in the two EAs, and IWP has provided no evidence that any further information is necessary to reach a conclusion regarding whether the fence will meet the nonimpairment criteria.

In the IMP, BLM set forth three nonimpairment criteria for managing a WSA while the area is under wilderness review. In order to undertake a proposed activity, it must meet all of the criteria or otherwise be considered nonimpairing. See Committee for Idaho's High Desert, supra at 255. Such criteria are that the activity is temporary, any impacts are capable of being reclaimed to the condition of being substantially unnoticeable in the WSA as a whole by the time the Secretary of the Interior is scheduled to recommend to the President whether to designate the area as wilderness, and, after termination of the activity and any needed reclamation, the area's wilderness values are not degraded so far, compared with its values for other purposes, as to significantly constrain the Secretary's recommendation. 44 Fed. Reg. at 72018; Dave Paquin, 129 IBLA 76, 80 (1994).

The IMP primarily governs activity proposed to occur prior to the Secretary's recommendation. It is also applicable to activity that will occur after that recommendation and before Congress acts. Lassen Motorcycle Club, 133 IBLA 104, 106-07 (1995). Thus, such activity may be permitted only where it will be substantially unnoticeable and also satisfy the other wilderness criteria whenever Congress acts. Id. at 107-08; see Instruction Memorandum (IM) No. 94-236, dated July 13, 1994, at 1, 2; Handbook (H-8850-1 (Rel. 8-67 (July 5, 1995))) at 9.

Therefore, an activity will be considered to satisfy the criterion of being "temporary," where it can be easily and immediately removed or terminated whenever Congress designates the WSA as wilderness. Wilderness Watch Oregon Natural Resources Council, supra at 308. However, there are certain "exceptions" where the activity need not be immediately removed or terminated when Congress acts, but may continue even after designation. See Handbook at 9. In addition, such activity may create a new surface disturbance and involve the permanent placement of structures. These exceptions include activities in "Exception 4," which covers "[a]ctivities that clearly protect or enhance the land's wilderness values or that provide the minimum necessary facilities for public enjoyment of the wilderness values." Id. Such activities are considered to be nonimpairing and thus are excepted from the requirement to satisfy the nonimpairment criteria. See Committee for Idaho's High Desert, supra at 255. However, even though an excepted activity has a beneficial impact on certain wilderness values, it must also generally satisfy the wilderness criteria, and not adversely affect Congress' ability to designate the whole area as wilderness. See IM No. 94-236, at 1, 2.

In the present case, the Area Manager concluded, in her two DR/FONSI's, that "[o]verall, wilderness values would be enhanced by the selection of the proposed action." See DR for EA #ID-040-7005 at 1; DR

for #ID-040-7006 at 1. She also found that it would "allow for the protection of riparian vegetation within this critical habitat area, thereby reducing sediment entering the riverain system as a result of livestock grazing impacts to riparian habitat along Burnt Creek." (DR for EA #ID-040-7005 at 1.) She made a similar finding in the DR for EA #ID-040-7006 for the riparian habitat along the Pahsimeroi River. See DR at 1. The Area Manager, thus, in finding wilderness values would be enhanced by the temporary fences within the WSA, brought these fences within those authorized by the IMP. We approved a similar temporary fence alignment in Wilderness Watch Oregon Natural Resources Council, 142 IBLA 302, 307 (1997), where BLM found that the temporary fence within a WSA complied with the IMP and did not violate BLM's interim management guidelines. Id. We find that the fences described in the proposed actions meet the IMP criteria set forth above.

[2] IWP also contends that the Area Manager violated NEPA requirements in the EA by failing to adequately consider economic impacts, aesthetic impacts, water quality and associated impacts, and by failing to consider adequate alternatives. The Board has held that BLM's approval of construction of temporary fences within grazing allotments and partially within a WSA is not in violation of section 102(2)(C) of NEPA, where BLM adequately considers the environmental impacts of such activity and all appropriate alternatives. See Wilderness Watch Oregon Natural Resources Council, supra at 305.

The contention by IWP with regard to economic impacts concerns the cost of the proposed fencing and the relationship of that cost to overall benefits of the project. It is true that the cost of the construction of the fence is not addressed in either EA; however, it is not required. As we noted in National Wildlife Federation v. BLM, supra at 101, "[t]o the extent Judge Rampton's Decision may be construed as requiring an economic cost/benefit analysis, it is modified to make it clear that no such analysis is required." See also IM No. 95-136 (June 1, 1995). BLM is only required to informedly and rationally balance competing values, and it has done so.

Appellant's contention that BLM failed to consider aesthetic considerations is without merit. As we observed above, the Area Manager found that "[o]verall, wilderness values would be enhanced by the selection of the proposed action." See DR for EA #ID-040-7005 at 1; DR for #ID-040-7006 at 1. She also found that it would "allow for the protection of riparian vegetation within this critical habitat area, thereby reducing sediment entering the riverain system as a result of livestock grazing impacts to riparian habitat along Burnt Creek." (DR for EA #ID-040-7005 at 1.) Although BLM stated in both DRs that the high tensile temporary three strand electric fences "would lower the quality of the visual landscape to a minor degree * * * along the fenceline," it determined that "visual landscape improvements within the enclosure outweigh negative impacts." (EA #ID-040-7005 at 6-7.) The Area Manager further noted in respect to areas "[w]ithin the WSA, the proposed action would fall within class 1 VRM

[Visual Resource Management] management objectives which emphasize preservation of the existing landscape." (EA #ID-040-7005 at 5.) IWP has provided no evidence to the contrary. At best, Appellant simply asserts an unsupported, contrary opinion.

Similarly, Appellant's claim that BLM has not adequately addressed water quality in the two EAs is without merit. Appellant argues that water gaps are proposed to be maintained for livestock watering on Burnt Creek without any analysis of the effects of this concentrated livestock use and the likely pollution from such use. (SOR at 2-3.) As BLM explains, however:

Implementation of this project would eliminate Burnt Creek as a water source for livestock in Burnt Creek Allotment and Pines/Elkhorn Allotment. Livestock would still be able to water at existing stock watering areas in these two allotments. In the Upper Pahsimeroi Allotment, a small water gap would be placed as illustrated on the attached map. This water gap is not expected or desired to water all the livestock in this allotment. As a result, the Poison Springs Pipeline EA #ID-040-7003, has been proposed to mitigate this loss as a water source.

(EA #ID-040-7005 at 7.) BLM points out that the proposed fencing is the second phase of a sequence of projects and management adjustments which are designed to "return the support status of all identified beneficial uses to fully supported." Id. BLM states that the improved livestock control resulting from the limited fencing will also "result in reduced sediment loading to the affected streams, increased shading and temperature reduction, and increased filtration of pollutant loads from non-point agricultural sources." Id.

Appellant also claims BLM violated NEPA by failing to consider and analyze an adequate range of alternatives to the Proposed Decisions. (SOR at 3.) IWP asserts that "[t]he analysis of the alternative #2, the no action alternative[,] is cursory and inadequate[,] and a reasonable alternative of removing livestock from these allotments has not been addressed in any way." Id. We disagree.

Initially, we find that BLM did not err in failing to consider the alternative of not permitting any grazing on these allotments, since that would not accomplish the purpose intended to be served by the proposed action, i.e., preventing cattle on each allotment from grazing in the riparian areas of the allotments. See Howard B. Keck, Jr., 124 IBLA 44, 53-54 (1992). Such an alternative is only properly considered in the context of deciding whether to modify the controlling management framework plan. See id. at 54.

Similarly, Appellant's claim that the "no action" alternative (Alternative #1) is cursory and inadequate is without merit. Discussion of this alternative within the EA found that the impacts from season-long grazing,

described as excessive grazing utilization, poor distribution, reduced vigor of preferred species, increased composition of undesirable plants, and the continuation of poor riparian conditions, would be perpetuated under this alternative. (EA #ID-040-7005 at 7.) Finally, although not addressed by Appellant, Alternative #2, the permanent fence alternative, was not selected by BLM because its lack of temporary characteristics did not meet the nonimpairment criteria for the Burnt Creek WSA. Id.

In this case, the Area Manager adequately considered the environmental consequences of constructing the fences within the subject allotments, and alternatives thereto. The Area Manager properly concluded that no significant environmental impacts would result from construction of the fences; thus, BLM was not required to prepare EIS'.

We conclude that Appellant has failed to carry its burden to establish, by a preponderance of the evidence, that BLM erred in finding that the wilderness values in the Burnt Creek WSA would be protected and enhanced by construction of the fences. See Nevada Outdoor Recreation Association, 136 IBLA 340, 344 (1996), and cases cited. As to its impact on visual resources, IWP proves only that the fence would be substantially noticeable to those in its immediate vicinity. It does not present any evidence that it would be substantially noticeable in the WSA as a whole or any substantial portion thereof. Nor does it attempt to define to what extent the natural scenery of the WSA would be affected. Thus, we are not persuaded that construction of the fences will adversely impact the naturalness of the WSA. See Utah Wilderness Association, 72 IBLA 125, 128 (1983).

To the extent Appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge

